

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ANDREW FLOWERS,

Defendant-Appellant.

UNPUBLISHED

August 28, 2007

No. 267943

St. Joseph Circuit Court

LC No. 05-013075-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

JANSEN, J. (*concurring*).

I fully concur in the majority's conclusion that defendant has forfeited his unpreserved argument on appeal by failing to show that the grant of witness immunity resulted in outcome-determinative plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). There was sufficient independent evidence of defendant's guilt in this case.

However, I write separately to call attention to the improper procedure followed by the prosecution in this case. The grant of witness immunity in criminal proceedings is controlled by Michigan's witness immunity law, MCL 780.701 *et seq.* Although the prosecution purported to grant *transactional* immunity to its witness in this matter, the language of MCL 780.702(3) envisions only *use* and *derivative-use* immunity for witnesses in criminal proceedings. I therefore conclude that Michigan law authorizes only *use* and *derivative-use* immunity.

Moreover, I am compelled to conclude that prosecutors lack the independent authority under Michigan law to grant immunity to witnesses in criminal trials. I am fully aware that some panels of this Court have recognized the purported authority of prosecutors to enter into "informal immunity agreements" with witnesses in criminal cases. As those panels have noted, the grant of "informal immunity" is apparently not uncommon in federal criminal prosecutions. I am further aware that Michigan's prosecutors enjoy broad authority and discretion in deciding whether to plea bargain, whether to prosecute, and what charges to file. *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991). However, under the plain language of MCL 780.701, state prosecutors clearly lack the independent authority to grant immunity for witnesses in criminal matters. Instead, with regard to misdemeanor and felony trials, the prosecutor must first apply to the trial judge for witness immunity, MCL 780.701(1)(b), and only the trial court itself may then enter an order granting the requested immunity, MCL 780.701(3). There is simply no record evidence that the prosecution ever sought or obtained the trial court's approval before

attempting to immunize the witness in this case. Accordingly, the prosecution was not authorized to independently enter into the immunity agreement.

/s/ Kathleen Jansen